APPENDIX A

Opinion of the Superior Court, Law Division—Fusco, J.

In this suit, the plaintiff seeks to recover from the defendant, Louis Jaffe, on three checks totaling the sum of $13,000, one of which is dated July 10, 1962 for $5,000, the second dated August 1, 1962 for $5,000 and the third dated August 9, 1962 for $3,000. He also seeks to recover interest from the date of the several checks down to date which he claims totals $1,842.50. The defendant seeks to avoid liability on the checks in question on the ground that an oral agreement was made at the time of the delivery of those checks or some time prior thereto for a repayment of the amount of those checks by a credit of ten per cent on any purchases made by Unique Supermarket from the Clinton Milk Company.

The Unique Supermarket being an organization with which the defendant was associated and the Clinton Milk Company being that which the plaintiff was associated with. The plaintiff (?) claims that those purchases and that this activity was in violation of N.J.S.A. 4:12A-30, secret agreement for price reduction prohibited, part of the Milk Control Act, and there was the secret agreement infected with such illegality as to render it unenforceable.

Assuming for the purpose of this decision that this defendant sustained his burden of proof, and that there was an oral agreement that this repayment of the $13,000 advance was to be repaid by a credit of ten percent rebate on the price of milk bought by the Unique Supermarket from the Clinton Milk Company, the question is whether such a rebate was prohibited by the statute at that time.

Appendix A

Now, N.J.S.A. 4:12A-30 provides, "No licensee or other person, association, or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual or secret agreement, arrangement, combination contract or common understanding, with any other licensee or person, firm, association or corporation, whereby the price of milk to be paid to producers in this state is reduced or the price to be paid by dealers, processors, subdealers, stores or consumers for such milk is decreased in pursuance of such mutual or secret agreement, arrangement, combination, contract, or common understanding and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall subject the violator or violators to the penalty in this act prescribed. . . ." N.J.S.A. 4:12A-35 provides for one of the several penalties which has to do with a suspension of a license where the applicant or licensee has been a party to a combination to fix prices contrary to the provisions of this Act and 4:12A-39 provides for further penalties which indicate a penalty of not more than $50 for the first offense and not more than $200 for the second or each subsequent offense; as well as the seizure for sale of any milk sold in violation of provisions heretofore referred to and the provisions for the manner in which said penalties are to be paid.

The defendant further urges that the transaction was illegal and unenforceable because it represented a loan by an alleged licensee to a customer prohibited by the statute that in order that all unfair trade practices may be eliminated which might harm the producer's interest, and which would tend to reduce a wholesome supply of milk for the

health and welfare of the citizens of this state. No licensee shall give or lend anything of value to any customer served by a licensee or limited to be served by the licensee. Unquestionably the plaintiff is not a licensee, although he is a representative of the licensee and the defendant, himself, is not a licensee although he was an officer and manager and a stockholder of the licensee.

The question that I must determine first is if there is a violation of the statute or any relation thereunder and, secondly, whether such violation, if any, makes void the loan and makes it unenforceable. Frankly, I do not find anything which taints the loan given from the plaintiff to the defendant so as to render it void. The penalty section of the statute heretofore mentioned contributed only a civil penalty for a violation of any of the laws with a further right to injunctive relief against the habitual violators.

In that regard the broad and strong powers to suspend or revoke a license for a violation of the statute is given by N.J.S.A. 4:12A-35. A violation is not a crime, although such is suggested by the defendant when he suggests that in the course of making those loans the plaintiff was conducting a disorderly house at the premises at which the violation took place. The statute is not like the Small Loan Act where there is a declaration that every loan in which any violation has occurred as to interest rate or other charge shall be null and void. *Consolidated Plan of New Jersey* v. *Meyer Shanholtz,* 7 N. J. Misc. 876, Supreme Court, 1928, *Consolidated* v. *Palkowitz,* 107 N.J.L. 517 E. & A. 1931 nor like the provisions of N.J.S.A. 2A:40-3 by which, "all promises, agreements or instruments consideration for which any money property or thing in action whatsoever laid, won or bet in violation of gaming laws

are declared utterly void and of no effect, similar to N.J.S.A. 31:1-3 forbidding the collection of any loan interest where the rate is usurious. As a further comparative example, the Alcoholic Beverage Control Law forbids loans, and similar interests between the brewer and the retailer. N.J.S.A. 33:1-43 as amended without specifying nullity of such obligations, but a violation of the law is made a criminal misdemeanor as well as subjecting the officer to additive disciplinary proceedings affecting the licensee.

The question remains whether the agreement for rebates by express statutory or regulatory provisions is illegal and unenforceable on the grounds it is against the public policy because contrary to a prohibition imposed by administrative regulations or the statute. It is not every agreement or transaction violative of the statute which is ipso facto void as against the vague and variable concept of public policy. The question must be determined in the light of the particular circumstances of each case. The doctrine should be applied with caution and only in cases falling within the reason to which the doctrine applies.

Allen v. *Commercial Casualty Insurance Company,* 131 N.J.L. 479, 1949 was a case arising under the Milk Control Law. We are not dealing with that. We are dealing with a case involving an agreeement.

In *Girard Trust Company* v. *Smith,* 129 N.J.E. 444, 1949. In *Lobeck* v. *Gross,* 2 N.J.L. 100, 1949 or with one where the contract represented an agreement by both parties to preclude the operating of State Policy found in *Houston Petroleum Company* v. *Automotive Products,* 9 N. J. 122. In *Buckelew* v. *Martens,* 108 Law 339, wherein it was held that price fixing agreements among business competitors

are illegal whether in fact a detriment to the public or not, whether for the purpose of making higher prices the public is entitled to have competition and it makes no difference whether the price fixing agreements are reasonable or distinguished from the Buckelew case in that the case is not concerned with price fixing agreements among competitors. The oral agreement in this case concerns not a licensee, any licensee customer, but a third party who may have had a connection with a licensee and a third party defendant who had a connection possibly with a customer.

The defendant cites further *Jacobson* v. *Graves* at 41 N.J.L. 195 where a note was given for a consideration found to be in violation of the Servicemen's Readjustment Act of 1944. In this case the Legislature did not see fit in the Milk Control Law to prohibit loans as it did in the case of rebates. I am not prepared to say that the violation of only a prohibition imposed by the statute renders the transaction nugatory as against public policy. It is interesting to note that the statute definitely does not refer to public policy, but refers to the public interest which makes a differentiation. So under the particular circumstances and representation of parties here and especially in the absence of any statutory prohibitions or a criminal penalty, I fail to find sufficient basis for same, that the public interest is in fact the public policy which makes the obligation null and void and unenforceable. Citing from an unreported opinion *Clinton Milk Co.* v. *Hyman Chuven and Jack Rogerson,* by Judge Hall, March 1, 1957, L-7359-55.

Frankly, I am satisfied that the plaintiff is entitled to recover on the several checks which have been issued and that this plaintiff is entitled to recover only that amount for which those rebates were enforceable. As I see it from

the testimony as adduced on cross-examination and remains undisputed that total purchase were made from the Clinton Milk Company by the Unique Supermarket in the sum of $10,000 at a rate of ten per cent, there should be a credit of $1,000 to the defendant as against the $13,000 leaving a balance due to the plaintiff of $12,000.

Now, the issue now arising as to whether or not under such arrangements any interest is collectable. I find that there was no indication that there would be any interest payable, but that the principal amount would be repaid without interest. With that in mind, I refer to the case of *Jardine Estates* v. *Donna Brook Corporation* at 42 Super 332 Appellate Division, 1956, wherein the Court is given the discretion as to whether interest may be allowed. It holds that "interest should not be allowed where the damages are unliquidated and not capable of ascertainment by mere computation, or where serious and substantial controversy exists as to whether plaintiff was entitled to receive interest at the time of the making of this transaction, and I find that he was not. So that the plaintiff will only be entitled to receive interest from the date of the institution, the date of March 12, 1963, which would be one year so that the plaintiff would be entitled to receive interest in the sum of $1260 which will be added to the principal sum of $12,000.

Judgment will be entered in the sum of $13,260 in favor of the plaintiff and against the defendant.

(Judgment Entered in above Opinion on December 15, 1964.)

APPENDIX B

Opinion of the Appellate Division of the Superior Court, decided February 23, 1966

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-297-64

PHILIP MARX,
Plaintiff-Respondent,

vs.

LOUIS JAFFE,
Defendant-Appellant.

Argued February 10, 1966—Decided February 23, 1966

Before JUDGES GAULKIN, LABRECQUE and BROWN.

MR. RICHARD M. GLASSNER argued the cause for appellant (MR. SALVATORE A. BRANCATO on the brief).

MR. LOUIS ASARNOW argued the cause for respondent.

PER CURIAM

Plaintiff sued for repayment of alleged loans to defendant totalling $13,000. Defendant contended (1) that the monies were not loaned but were advanced to a corporation known as U-Neek Super Market of which he was a principal stockholder, and (2) in any event, they represented

an advance rebate to the corporation under an agreement for the purchase of milk and milk products by the corporation from Clinton Milk Company, a dairy controlled by plaintiff, which agreement was illegal and unenforceable as violative of N.J.S.A. 4:12A-30. *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959), affirmed o. b. 31 N. J. 601 (1960).

At the conclusion of the trial without a jury the judge determined:

> "Frankly, I am satisfied that the plaintiff is entitled to recover on the several checks which have been issued and that this plaintiff is entitled to recover only that amount for which those rebates were enforceable. As I see it from the testimony as adduced on cross-examination and remains undisputed that total purchase were (sic) made from the Clinton Milk Company by the Unique (sic) Supermarket in the sum of $10,000 at a rate of ten per cent, there should be a credit of $1,000 to the defendant as against the $13,000 leaving a balance due to the plaintiff of $12,000."

Unfortunately we find ourselves unable to decide the points raised in this appeal because of a lack of findings of fact which we deem essential to its determination. *State* v. *LaPierre*, 39 N. J. 156, 165, 166 (1963); *Franzoni* v. *Franzoni*, 60 N. J. Super. 519 (App. Div. 1960). The case is therefore remanded to the trial judge for his findings of fact and conclusions of law upon the following questions:

(1) As to each of the advances which admittedly made up the total sum of $13,000, did the parties agree that this constituted a loan which was to be repaid by defendant?

(2) Did any portion of the aforementioned amount come into the hands of U-Neek? If so, how much and when?

(3) Was it agreed between plaintiff and defendant that the amount of such indebtedness would be reduced by an amount equal to 10% of all sales of milk or milk products made by Clinton Milk Company to U-Neek Super Market? If so, when was such agreement made?

(4) If the answer to (3) is in the affirmative:

(a) Was it the intention of the plaintiff, in advancing the aforementioned sums, to circumvent the provisions of N.J.S.A. 4:12A-30?

(b) Was defendant then acting on behalf of or with the approval of U-Neek? Did plaintiff know he was so acting?

(c) Was such agreement contrary to N.J.S.A. 4:12A-30? If not, why not?

If trial judge wishes to do so, he may take additional testimony. He may also file a supplemental opinion or supplemental findings of fact and conclusions of law. We think that this can be accomplished by March 15. Within 15 days thereafter counsel may file supplemental briefs in letter form with this court. We will then advise counsel whether further oral argument is necessary.

We retain jurisdiction.

APPENDIX C

Opinion of the Appellate Division of the Superior Court, dated August 5, 1966

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-297-64

PHILIP MARX,
Plaintiff-Respondent,

vs.

LOUIS JAFFE,
Defendant-Appellant.

Decided August 5, 1966.

Before JUDGES GAULKIN, LABRECQUE and BROWN.

On appeal from Superior Court, Law Division, Essex County.

MR. RICHARD M. GLASSNER argued the cause for appellant (MR. SALVATORE A. BRANCATO on the brief).

MR. LOUIS ASARNOW argued the cause for respondent.

PER CURIAM

Plaintiff instituted this action to recover on an alleged loan to defendant represented by checks totaling $13,000. Defendant contends that the money received by him did not

constitute a loan, but was, instead, an advance rebate to the U-Neek Super Market (U-Neek), a now bankrupt corporation of which defendant was principal stockholder, under an agreement whereby U-Neek would purchase its milk requirements from Clinton Milk Company (Clinton), a dairy controlled by plaintiff. He urges that this was in contravention of N.J.S.A. 4:12A-30 which precluded agreements whereby the price of milk was reduced below that fixed by the Director of the Office of Milk Industry.

The trial court, sitting without a jury, determined that plaintiff was entitled to recover the amount of the checks issued to defendant, less $1,000 in credits earned by U-Neek under the rebate agreement.

We remanded the matter for further factual findings on questions which we deemed essential to our determination of the appeal. In response to our specific inquiry, the trial court found: (1) checks totaling $13,000 were made payable to defendant personally and he agreed to make repayment; (2) defendant deposited the full amounts in the account of U-Neek; (3) plaintiff and defendant agreed that the latter's indebtedness would be reduced by an amount equal to 10% of all sales of milk or milk products by Clinton Milk Company to U-Neek Super Market; (4) plaintiff's intention in advancing the monies was to circumvent N.J.S.A. 4:12A-30; (5) defendant acted on behalf of U-Neek and plaintiff knew he was so acting. The judge concluded that the parties' agreement was contrary to N.J.S.A. 4:12A-30, but that the penalty provisions of the statute were intended by the Legislature to be exclusive, consequently the agreement was enforceable.

We are in accord with the conclusion of the trial judge that the agreement between the parties was violative of the

statute. The device of couching the rebate agreement between U-Neek, represented by defendant, and Clinton, controlled by plaintiff, in the guise of a personal loan between the individuals does not alter the true nature of the transaction. We also recognize that by instituting this action against defendant personally, plaintiff hopes not only to avoid the impact of N.J.S.A. 4:12A-30, but also to avoid being a mere general creditor of the insolvent corporation, which would be his status had the "loan" been made directly to U-Neek.

Our accord with the trial judge that the agreement violates the statute does not extend to his conclusion that it is nonetheless enforceable because the Legislature had prescribed the exclusive penalties for violations thereof. Violators of the act subject themselves to a penalty of not more than $50 for the first offense and not more than $200 for the second offense, N.J.S.A. 4:12A-39, and the possible suspension or revocation of their licenses. N.J.S.A. 4:12A-35; *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959).

The fact that the alleged loan transaction contravenes the statute clearly renders the agreement illegal. *Brooks v. Cooper*, 50 N. J. Eq. 761, 771 (E. & A. 1893); *Restatement, Contracts* §580 (1932). However, merely to call a contract illegal is not to state the effects of such illegality. In each case the legislative intent must be sought. *John J. Carlin, Inc.* v. *O'Connor*, 126 N. J. L. 243, 245-46 (E. & A. 1941).

In N. J. S. A. 4:12A-30, the Legislature provided that any rebate "contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest * * * ." This express prohibition of

any bargain which reduces milk prices below the fixed minimum, coupled with the declaration that such bargains are contrary to the public interest, manifests the legislative intention that such bargains are unenforceable and that the statutory penalties are cumulative.

It is said to be an established rule that "the law will not assist either party to an illegal contract. The parties being in *pari delicto,* it will leave them where it finds them. If the contract be still executory, it will not enforce it, and if already executed it will not restore the *status quo ante.*" *Cameron* v. *International Alliance of Theatrical Stage Employees, Local, 384,* 118 N. J. Eq. 11, 20 (E. & A. 1935). The rule finds particular application in this case for two reasons. First, the explicit prohibition of any rebate agreement makes it manifest that such an agreement could not be enforced by one of the parties thereto were it wholly executory. Enforcement would promote the private interest at the expense of the public interest. Second, neither the partial execution in the instant case, nor any other factors, bring this matter within any of the exceptions to the general rule of non-enforceability. See generally, *Restatement, op. cit. supra* §§598-609.

This is not an instance where refusal to enforce or rescind an illegal bargain would produce a harmful effect on the parties for whose protection the law making the bargain illegal exists. In such cases, enforcement or rescission, whichever is appropriate, is allowed. *Id.* §601; *Cameron* v. *International Alliance of Theatrical Stage Employees, supra* at pp. 20-21. Here, on the contrary, the Legislature has expressly determined that the public interest in a constant flow of wholesome milk to consumers requires price regulation. *Abbotts Dairies, Inc.* v. *Arm-*

strong, 14 N. J. 319, 330 (1954). The public interest does not require that the court give either efficacy or consolation to the efforts of a party to an agreement to subvert the administratively determined price structure.

Further, this is not an instance where enforcement commends itself, despite illegality, in order to avoid an unjust forfeiture. See 6A *Corbin, Contracts* §1522 pp. 761-62 (1962). That consideration is inapplicable where the result accomplished by enforcement is expressly prohibited by statute. *Restatement, op. cit. supra* §§600, 603. More importantly, however, there is no unjust forfeiture in the present case. Plaintiff delivered the advance rebate to defendant with knowledge that the monies were to be a fund for U-Neek. Defendant was a mere conduit despite the efforts of the parties to cloak him otherwise. It would be incongruous to reward plaintiff with a position superior to that of the creditors of the now insolvent U-Neek because of his efforts to circumvent N. J. S. A. 4:12A-30.

We have considered the unreported decision in *Clinton Milk Company* v. *Chuven* (Docket No. L. 7359-55), relied upon by the trial court, and find it inapposite. There, at the time of the alleged loan agreement, there was no minimum milk price regulation in effect.

In summary, we hold that the statutory prohibition of rebate agreements requires that no phase of this agreement may be enforced.

Reversed and remanded for the entry of judgment for defendant.

No costs.

APPENDIX D

Order of Mandate on Reversal by Appellate Division (August 5, 1966)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

APPEAL DOCKET NO. A-297-64

PHILIP MARX,

Plaintiff-Respondent,

vs.

LOUIS JAFFE,

Defendant-Appellant.

This cause having been duly argued before this Court by Richard M. Glassner, counsel for the appellant and Louis Asarnow, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court-Law Division-Essex County is in all things reversed, set aside and for nothing holden, withous costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court, and that the record

and proceedings be remitted to the said Superior Court-Law Division—Essex County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 5th day of August, 1966.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

APPENDIX E

Order of the Supreme Court of New Jersey Denying Certification, dated October 4, 1966

SUPREME COURT OF NEW JERSEY
C-47 September Term 1966

PHILIP MARX,

Plaintiff-Respondent,

vs.

LOUIS JAFFE,

Defendant-Appellant.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 4th day of October, 1966.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX F

Full Text of Statutes Pertinent to Milk Control Act

4:12A-2

Milk Control Board: established; first members; term of office. There is hereby established a board to be known as the "Milk Control Board" which shall consist of three members who shall be citizens of this State.

4:12A-4

The board shall appoint a director of milk control for a term of five years. . . .

4:12A-7 General Powers of board and director: orders, rules and regulations

The board and the director are hereby declared to be the instrumentalities of the State for the purpose of attaining the ends in this act declared and the board and director are hereby vested with power as provided in this act. The director shall have power to issue orders, rules and regulations to carry out the objects and provisions of this act, and all such orders, rules and regulations by the director shall be made in his name and over his signature. All orders, rules and regulations by the board on appeal shall be issued by the board.

4:12A-8 Enforcement of act and rules and regulations

Any duly authorized appointee of the director shall, subject to the limitations, herein contained, enforce the provisions of this act and all rules and regulations promulgated by the director and all orders thereunder made by the director. L. 1941, c. 274, p. 718, Sec. 8.

Appendix F

4:12A-9 Appeals: hearings and determination by board: stay

The Board is hereby empowered and charged with the duty to hear, review and determine all appeals by any person, applicant or licensee aggrieved by any act, proceeding, rule, regulation, decision or determination of the director . . .

4:12A-12 Review by Superior Court: bond

Any person, applicant or licensee aggrieved by any order or determination of the board made pursuant to this act may obtain a review of the action complained of by the Superior Court in a proceeding in lieu of prerogative writ which court shall have jurisdiction to suspend, reverse or vacate the order or determination so made by the board. L. 1941, C. 274, p. 719, Sec. 12; L. 1953, C. 5, p. 38, Sec. 33.

4:12A-19 Investigations: Powers of directors

The director shall have power to investigate all matters pertaining to the jurisdiction, distribution, importation, storage, disposal, classification, *sale or resale, conditions and terms of sale or resale,* costs of production, distribution, sale and resale, processing sale for manufacture of milk as defined in this act in the State of New Jersey as may be necessary to carry out the provisions of this act. L. 1941, C. 274, p. 721, Sec. 19. (Emphasis supplied.)

4:12A-21 Powers of director enumerated

The director may fix the price at which milk is to be bought, sold or distributed; regulate conditions and terms of sale, establish and require observance of fair trade practices, supervise, *regulate and control the entire milk in-*

dustry of the State of New Jersey, including the production, importation, classification, processing, transportation, *disposal, sale or resale,* storage or distribution of milk as defined in this act in the State of New Jersey. . . . (Emphasis supplied.)

4:12A-39 Violations of act; penalty; seizure and sale

Any person, who shall violate any of the provisions of this act or the orders, rules and regulations of the director, as adopted from time to time, shall be deemed guilty of a violation of the provisions of this act and shall pay a penalty of not more than $50.00 for the first offense and not more than $200.00 for the second or each subsequent offense, and such penalty, when collected, should be paid to the Treasurer of the State of New Jersey.

4:12A-41 Penalties, Collection of, commitment to jail

The County Courts and the county district courts shall have jurisdiction of actions for penalties under this act and such penalties shall be collected and enforced in a summary manner pursuant to the "penalty enforcement law" (See 2A:58-1). . . .

4:12A-48

The operation and effect of any provisions of this act conferring a general power upon the board or director shall not be impaired or qualified by the granting to the board, the secretary, the director or an employee or agent of the director of this Act, of a specific power or powers, not inconsistent with the provisos contained in paragraph twenty-one of this act. L. 1941, C. 274, p. 737, Sec. 48.